No. 17-532

In the

Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF OF PACIFIC AND INLAND NORTHWEST TREATY TRIBES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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I. INTEREST OF THE AMICI[1]

Amici are Indian tribes in the Pacific and Inland Northwest, each of which is a signatory or political successor in interest to those tribes and bands that entered into one of several distinct treaties with the United States in 1854 and 1856, commonly referred to as the "Stevens Treaties".[2] These tribes ceded vast amounts of their territories to the United States, while reserving their rights to hunt and gather outside their Treaty-created reservations on "unclaimed" or "open and unclaimed lands."[3] Today,

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[1] Pursuant to Supreme Court Rule 37.2, Petitioner and Respondent have granted blanket consent to amicus briefs. None of the parties or their counsel authored any part of this brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief, and no person or entity other than Amici and their counsel made such a monetary contribution to the preparation or submission of this brief.

[2] A full list of Amici appears at Appendix A.1.

[3] Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, art. I, 12 Stat. 945, 946 (June 9, 1855); Treaty with Nisqualli, &c, art. III, 10 Stat. 1132, 1133 (Dec. 26, 1854); Treaty between the United States and the Duwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory, art. V, 12 Stat. 927, 928 (Jan. 22, 1855); Treaty between the United States of America and the S'Klallam, Skokomish, Toanhooch, and Chimakum Indians, art. IV, 12 Stat. 933, 934 (Jan. 26, 1855); Treaty between the United States and the Yakama Nation of Indians, art. III, 12 Stat. 951, 952 (1855); Treaty between the United States of America and the Nez Percé Indians, art. III, 12 Stat. 957, 958 (June 11, 1855); Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, art. III, 12 Stat. 975, 976 (July 16, 1855); Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, art. III, 12 Stat. 971, 972 (Jan. 25, 1856); and, Treaty with the Tribes of

Amici Tribes continue to exercise their Treaty-reserved hunting and gathering rights, as the Indian signatories at the time of the Treaties understood them, on such lands, including National Forest lands located in (and, in some cases, spanning more than one of) the present-day states of Idaho, Montana, Oregon and Washington.

II. SUMMARY OF THE ARGUMENT

On the narrow question presented in this case concerning only the Crow Treaty of 1868, Amici Tribes write separately to emphasize: (1) the continuing significance of Treaty-reserved hunting and gathering rights; (2) that every state and federal court construing the Stevens Treaties based on the Indians' understanding has confirmed that National Forest land is "unclaimed" or "open and unclaimed land" within the meaning of these treaties; and (3) that early American hunting law, with which the United States' negotiators would have been familiar at the time of the Treaties, is consistent with the Indians' understanding that the Treaty right to hunt on "unoccupied lands" would include lands that are today National Forests.

Amici Tribes support the positions of Petitioner Herrera, the United States, and the Crow Tribe that this Court's ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) forecloses the Wyoming lower court's reliance on *Ward v. Race Horse*, 163 U.S. 504 (1896) and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996), to preclude inquiry into the Indian signatories' understanding of the Crow

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Middle Oregon, art. I, 12 Stat. 963 (June 25, 1855) (negotiated by Superintendent of Indian Affairs Joel Palmer).

Treaty's reserved right to hunt on "unoccupied lands of the United States." Amici Tribes also support Petitioner, the United States, and the Crow Tribe's position that *Crow Tribe of Indians v. Repsis* is a poorly reasoned outlier and further note that it is the only instance in which a court has concluded that mere designation of a National Forest by the United States could operate to "occupy" land, thus extinguishing the Treaty rights on the federal public lands at issue here.

III. ARGUMENT

A. Tribal Treaty Hunting, Deeply Rooted in Culture, Religion and Tradition, Is Vital

Since time immemorial, and continuing to this day, hunting, fishing and gathering have been central to Amici Tribes' subsistence, economy, culture, spiritual life, and day-to-day existence. These activities "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Through treaties, tribes reserved these usufructuary property rights in perpetuity.

Amici have maintained their traditional culture, which depends heavily on the traditional use of natural resources. Amici Tribes' ability to subsist and thrive continues to require the ability to freely go beyond reservation boundaries to fish, hunt, and gather food when it is available. For millennia, Amici have hunted game and gathered botanicals to feed their families. These food sources remain vitally important to this day not only for traditional and ceremonial purposes, but also for tribal members' health and well-being.

Historically, Amici hunted all available wildlife and gathered all harvestable botanicals. These included big and small game animals, fur-bearing animals, birds and waterfowl; and, ferns, grasses, rushes and tails, root vegetables, fruits, nuts, seeds, herbs, mosses and fungi. Today, Tribal members continue to hunt and gather to supply foods for ceremonial and religious purposes such as the canoe journey, tribal weddings, funerals, name-giving, religious observance and potlatches.

Tribal hunters often hunt for others who cannot hunt for themselves, including Tribal elders. Tribal culture is based on extended family relationships of parents, grandparents, aunts, uncles, cousins and other relatives. A tribal hunter or gatherer typically shares the harvest with several families and, because the harvest is widely shared, it is used quickly, benefiting the whole community. The entire animal is used to the greatest extent possible, to minimize waste.

Today, consistent with their historical practices, Amici manage and co-manage resources with their federal and state counterparts, and assume the responsibilities that accompany their treaty-reserved rights through tribal hunting regulations and other mechanisms. Amici's co-management with their federal and state counterparts in Idaho, Montana, Oregon and Washington includes wildlife management, harvest allocation, and regulatory enforcement.

Tribal hunters and gatherers harvest a small fraction of the wildlife and botanical resources taken annually throughout the West. For example, in recent years in Washington State, tribal members have harvested between two and five percent of the state-

wide non-tribal elk and deer harvest, and tribal deer harvest remains lower than the yearly state roadkill rate. https://nwifc.org/about-us/wildlife/.

The continued exercise of Amici's hunting and gathering rights, including the exercise of those rights on National Forest lands, remains of critical and enduring importance. These rights were expressly reserved by the tribes in exchange for ceding vast amounts of their homelands to the United States. As the other party to the Treaties, the United States secured these rights to the Crow Tribe and to the Amici Tribes in their Treaties.

B. Treaty-Reserved Hunting in National Forests is Consistent with the Understanding of the Indian Parties to the Treaties as Confirmed by Every Court, State or Federal, Construing these Treaties

Construing Indian treaties involves an inquiry into the intent of the parties; the history of the negotiations, their purpose, and the context in which they occurred; and the practical construction adopted by the parties. *See Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-79 (1979). Indian Treaty language must "'be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Id.* at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11, 20 (1899)); *see also United States v. Washington*, 384 F. Supp. 312, 331 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

On the narrow issue before this Court of whether mere designation of a National Forest can serve to extinguish the Crow Tribe's 1868 Treaty-reserved right to hunt on "unoccupied lands of the United States," it is informative that every state and federal court construing the right to hunt on "unclaimed" or "open and unclaimed" land has held that the Indian parties to the Stevens Treaties would have understood the concept of a National Forest as consistent with "unclaimed" or "open and unclaimed" land to which the reserved hunting right would apply.

Courts, both state and federal, in Idaho, Montana, Oregon and Washington have long recognized National Forests as subject to reserved Indian treaty hunting rights. The Idaho Supreme Court, in *State v. Arthur*, interpreted treaty language reserving the Nez Perce Tribe's right to hunt on "open and unclaimed land" as expressly encompassing National Forest land. *State v. Arthur* construed this Treaty language by examining the understanding of the Treaty Indians, as reflected in the minutes of the Treaty negotiations kept by the United States,[4]

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[4] *State v. Arthur* recites Governor Stevens' promises at the treaty negotiations that "You will be allowed . . . to kill game on land not occupied by the whites" and Looking Glass would be able to "kill game and go to buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers." 261 P.2d at 140-41. Governor Stevens made similar assurances in other treaty negotiations. *See United States v. Washington*, 853 F.3d 946, 964 (9th Cir. 2017), *aff'd*, *Washington v. United States*, 584 U. S. ____, 138 S. Ct. 1832 (2018) (*per curiam)* (noting that Governor Stevens told the Indians during negotiations for the Point Elliott Treaty, "'I want that you shall not have simply food and drink now but that you may have them forever'"); *see also* Point No Point Treaty Council Minutes ("Mr. F. Shaw, the Interpreter, explained to them that they

which document Indian leaders emphasizing that "our rights shall be protected forever" and receiving assurances from Governor Stevens that they would continue to be able to hunt and gather on "lands not occupied by settlers". 261 P.2d 135, 140-41 (1953), *cert. denied*, 347 U.S. 937 (1954). The Idaho Supreme Court held that the term "open and unclaimed land" as employed in the treaty "[w]as intended to include and embrace such lands as were not settled and occupied by the whites...and was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land'." *Id.* at 141. *State v. Arthur* also rejected Idaho's argument that these Treaty-reserved rights were altered by statehood. *Id.* at 140.

In a case affirmed by the Ninth Circuit in which the Confederated Tribes of the Umatilla Indian Reservation sued to enforce their right to hunt in the Umatilla and Whitman National Forests, the federal District Court of Oregon held that "'unclaimed'" lands within the meaning of the treaty included National Forest lands. *Confederated Tribes of Umatilla Indian Res. v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd. sub nom, Holcomb v. Confederated Tribes of Umatilla Indian Res.*, 382 F.2d 1013 (9th Cir. 1967). The Court examined the understanding of the Indians and the treaty minutes, and emphasized

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were not called upon to give up their old modes of living and places of seeking food."; "Chits-a-Mah-han or the Duke of York...My heart is good. I am happy since I heard the paper read and since I have understood Gov. Stevens, particularly, since I have been told I could look for food where I pleased, and not in one place only.)."

the hunting right's application to lands "not actually occupied by white settlers"; the court elaborated that, "[t]o construe 'unclaimed lands' to exclude land not occupied by white settlers would violate the solemn promise made to Indians more than a century ago." 262 F. Supp. at 872. Both courts rejected Oregon's statehood arguments, independently examining the understanding of the Indians. 262 F. Supp. at 872; 382 F.2d at 1014.

The Montana Supreme Court in *State v. Stasso*, a case involving a member of the Confederated Salish and Kootenai Tribes hunting on National Forest land, examined the understanding of the Indian parties to the 1855 Treaty of Hell Gate, rejected Montana's statehood arguments, and held that "the National Forest lands involved here are open and unclaimed lands" within the meaning of the Treaty. 172 Mont. 242, 245, 248 (1977).

Washington State courts have concurred that "open and unclaimed lands" within the meaning of the Stevens Treaties encompass National Forest land. *State v. Miller*, 102 Wash.2d 678, 680 n.2 (1984) (noting that "[s]everal courts have determined that [National Forest] land is 'open and unclaimed' within the meaning of the treaty"); *State of Washington v. Young*, 97 Wash. App. 1043 (unpublished) (1999) (reversing conviction of Yakama Indian for hunting during state's closed season in a National Forest, based on treaty right to hunt).[5]

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[5] While only the issue of National Forest land is before this Court, courts have also upheld the right to hunt on other types of forest lands and in similar areas. *See, e.g., State v. Buchanan*, 138 Wash.2d 186, 211-12 (1999), *cert. denied*, 528 U.S. 1154 (2000) (rejecting Washington's statehood arguments and hold-

All of these cases, reviewing the understanding of the Indians at the time of the Stevens Treaties,[6] come to the same conclusion: the mere designation of a National Forest does not extinguish Treaty-reserved rights to hunt on those lands. The evidence pointed to by Petitioner, the Crow Tribe, and the United States demonstrates that it is inconceivable that the Crow negotiators would have understood that a National Forest designation would extinguish their hunting rights on those lands under the Crow Treaty.

C. Nineteenth Century American Hunting Law Principles Provide Additional Interpretative Context and Support The "Unoccupied" Status of Subsequent National Forests

An understanding of the nineteenth century American legal landscape provides additional support for the conclusion that the Big Horn National Forest should be treated as "unoccupied" for purposes of the Crow Treaty hunting right. While the primary interpretive inquiry is the understanding of the Treaty Indians, who were required to negotiate critical protections for themselves in a foreign language, contemporary American legal principles make plain that the United States would have understood subsequently created National Forests as "unoccu-

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ing that publicly owned wildlife area constitutes "open and unclaimed land" within the meaning of the treaty).

[6] Amici note that some of the dicta in these cases and some of the forums in which these issues were litigated (*e.g.*, state criminal prosecutions) are imperfect or incomplete with respect to a full and proper understanding and application of their Treaty-reserved rights. This does not detract from the unanimous, correct conclusions these courts have reached that Amici Tribes' reserved treaty hunting rights encompass National Forest land.

pied" land where hunting, including Treaty-reserved hunting, could occur. Understanding the common law landscape helps deduce the intent of the United States, which, although entitled to less weight than the Indian signatories' understanding, is part of the context of the treaty negotiations. *Mille Lacs*, 526 U.S. at 196 (stating that courts must "look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties"); *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (noting that the Court regularly considers the context of a treaty's negotiation and adoption to promote interpretations "consistent with the shared expectations of the contracting parties").

When the Indian Treaties were negotiated, there were no hunting laws in effect in the Western United States territories. Instead, lands free from settlement were open to hunting for all. Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 Law & Hist. Rev. 351, 351 (2015) (noting that, in 1860, "most unfenced land in the United States was open to the wanderer"); *accord* Eric T. Freyfogle, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 33 (2007) (noting that, historically in America, "[h]unting and fishing were rather freely allowed except in cultivated fields and around houses"). This was a result of the United States' rejection, at the time of the American Revolution, of English laws restricting the majority of English citizens from hunting. In England, the King claimed ownership over all fisheries and wild animals, and, by creating Royal Forests and establishing qualification statutes, favored the landed gentry's right to hunt over that of the common citi-

zen. Thomas A. Lund, AMERICAN WILDLIFE LAW at 8-10 (1980). The American colonies rejected this aristocratic concept and instead chose the free taking of animals on all unsettled land. *Id.* at 24.

The right to access lands for hunting was not necessarily limited by ownership; rather, active settlement was required to bar access. For example, in a private lands context that predates the creation of National Forests, the South Carolina Constitutional Court of Appeals recognized a presumption that "the forests and unenclosed lands of this country" were open to hunters. *McConico v. Singleton*, 2 Mill Const. 244, 246 (1818). Two years after *McConico*, the same South Carolina court held that a hunter who entered a parcel of land enclosed by a dilapidated fence did not commit trespass. *Broughton v. Singleton*, 5 S.CL. (2 Nott & McC.) 338, 340 (1820).

This common principle of nineteenth century American law was borne out by the laws of the United States existing at the time the Crow Treaty was negotiated. For example, under the Homestead Act of 1862, the only way any person could lawfully "occupy" public land in the West was "for the purpose of actual settlement and cultivation." Act of May 20, 1862, Pub. L. 37-64 12 Stat. 392.

American law at time of the Crow Treaty, even from a non-Indian perspective, plainly required more for land to be considered "occupied" than just title ownership. The subsequently-created Big Horn National Forest would have been considered "unoccupied" for hunting purposes not only by the Treaty Indians – for them unquestionably so – but also by the United States negotiators and ratifiers of the Treaty. The vast woodland and prairie would have

been and, in many ways is still, considered the commons. It is federal public land that to this day is open to all hunting, including non-Indian recreational hunting.

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In the Pacific and Inland Northwest, some feared that adverse consequences would result from courts upholding the Amici's reserved hunting rights on National Forest land. These fears have not come to pass. Instead, these court decisions have resulted in increased acceptance of the tribes as wildlife and natural resource co-managers with their United States, Idaho, Montana, Oregon, and Washington counterparts.

In this case, considering the Crow Tribe's understanding of its Treaty-reserved hunting right and the evidence presented by Petitioner, the Crow Tribe and the United States, it is inconceivable that the Crow Treaty negotiators would have understood that the mere designation of lands as a National Forest would extinguish reserved hunting rights on those lands.

CONCLUSION

Amici Tribes respectfully urge the Court to reverse the judgment of the Wyoming district court.

Respectfully submitted,

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APPENDIX

APPENDIX A

This Appendix provides the names of federally-recognized sovereign Indian tribes which appear as Amici Curiae.

The Confederated Salish and Kootenai Tribes of the Flathead Reservation

The Confederated Tribes of the Umatilla Indian Reservation

The Confederated Tribes of the Warm Springs Reservation of Oregon

The Confederated Tribes and Bands of the Yakama Nation

The Hoh Tribe

The Jamestown S'Klallam Tribe

The Lower Elwha Klallam Tribe

The Muckleshoot Indian Tribe

The Nez Perce Tribe

The Nisqually Indian Tribe

The Nooksack Indian Tribe

The Port Gamble S'Klallam Tribe

The Puyallup Tribe of Indians

The Quileute Tribe

The Skokomish Indian Tribe

The Squaxin Island Tribe

The Stillaguamish Tribe of Indians

The Suquamish Tribe

The Swinomish Indian Tribal Community

The Tulalip Tribes of Washington